IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	CRIMINAL NO. RDB 06-0551
LENNY LYLE CAIN	*	

MEMORANDUM OPINION

Now pending before this Court is the Motion of the Defendant Lenny Lyle Cain ("Cain") to Suppress the Statements, Admissions and Confessions (Paper No. 43). This Court heard testimony and argument on Cain's Motion to Suppress on June 1, 2007. For the reasons that follow, as well as reasons set forth in the record at that hearing, this Court will, by separate Order, GRANT IN PART and DENY IN PART the Motion to Suppress Statements, Admissions and Confessions. Specifically, this Court grants the motion with respect to any statements made after Cain's Initial Appearance before Magistrate Judge James K. Bredar of this Court on November 29, 2006, and denies said motion with respect to any statements made prior to said appearance.

Background

DEA Special Agent Thomas Cindric ("Cindric") testified in a hearing before this Court on June 1, 2007 detailing the statements offered by Cain and the facts preceding any statements. Government also submitted a Supplemental Response to Defendants' Pretrial Motions detailing statements made by the Defendant.

Prior to Cain's Initial Appearance, Cain requested to speak with law enforcement agents and made statements to the officers.[1] He then appeared in front of Magistrate Judge James K.

[1]This Court has previously indicated on the record that Defendant Cain's Motion to Suppress statements made *prior* to his Initial Appearance was denied for the reasons stated in the

Bredar at his Initial Appearance in this Court on November 29, 2006.[2] During the Initial Appearance, Magistrate Judge Bredar advised Cain that he had the right to an attorney to represent him at all stages of the proceedings, including a right to counsel during questioning by the Government and if he could not afford an attorney, one would be appointed for him at no cost. Accordingly, Cain completed a financial affidavit indicating the need for court-appointed counsel. Judge Bredar informed Cain that the Court would appoint an attorney pursuant to the Criminal Justice Act and that if Cain wanted to hire a lawyer, he could do so at a later time.[3]

The day following his Initial Appearance, November 30, 2006, Cain requested to speak with law enforcement with hopes that he and his co-defendant Flinchum might be released from jail. Cindric and Detective William J. Denford Sr. ("Denford") reminded Cain that he did not have to make any statements without counsel present but made no effort to notify Cain's attorney that he was offering statements. The officers then read him his Miranda rights. Cain signed a

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record. There is no evidence that the will of the Defendant was "overborne and his capacity for self-determination critically impaired" by coercive government conduct. *United States v. Gray*, 137 F.3d 765, 771 (4th Cir. 1998), *cert. denied*, 525 U.S. 866 (1998) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)). Rather, the record indicates that these statements were voluntarily offered by the Defendant.

[2]In the Government's Supplemental Response to Defendants' Pretrial Motions and in the Motions Hearing on June 1, 2007, Government counsel made representations that Defendant Cain appeared before Magistrate Judge Bredar in his Initial Appearance on November 29, 2006. (Gov't. Supp. Resp. at 2.) This Court notes that the official court record for Criminal No. RDB 06-0551 reflects that Cain's Initial Appearance was before Magistrate Judge Susan K. Gauvey on January 12, 2007. Furthermore, the official court record for Magistrate No. JKB 06-4938 indicates that a Complaint was filed against Cain on November 29, 2006 (Paper No. 1), that he was temporarily committed that same day (Paper No. 3) and that he completed a financial affidavit on November 29, 2006 (Paper No. 2). This Court assumes that the representations made by the Government during the Motions Hearing and in its Supplemental Response regarding Cain's Initial Appearance on November 29, 2006 were accurate.

[3]Judge Bredar had previously appointed the Office of the Federal Public Defender for Maryland to represent a co-defendant in this case.

document acknowledging that, *inter alia*, he understood the Court was arranging to have an attorney appointed to him, that he waived his rights to have an attorney present and that he requested to speak with the law enforcement agents and the Assistant United States Attorney. Cindric, Denford and Assistant United States Attorney Christopher Romano were present for Cain's statement. None of them, at any point, attempted to notify Cain's attorney that he was offering statements.[4]

Cain's statement details his supplier of drugs. He spoke of a group of Mexicans in Baltimore, Maryland who obtained drugs from Mexico and then transported them across the US-Mexican border by paying off law enforcement agents. Cain provided the name of one of the drug smugglers and a description of his vehicle. Cain also spoke of an instance in which a person was forced to give the deed to his house to one of the smugglers to repay a debt he had incurred. Cain had observed the smugglers in possession of between eight and ten kilograms of cocaine.

Analysis

Still pending before this Court is the Motion of the Defendant Lenny Lyle Cain to suppress the statements he made on November 30, 2006 *after* his Initial Appearance on November 29, 2006 and his request for court-appointed counsel. Cain simply argues that it is his belief that an attorney represented him at the Initial Appearance and, therefore, the Government could not take any statements from him without first notifying his attorney. The Government concedes that Cain's Sixth Amendment right to counsel attached prior to the statements offered on November 30, 2006. However, the Government asserts that Cain initiated the statements with

[4]At the hearing of June 1, 2007, Government counsel acknowledged that if Cain had been represented by an Assistant Public Defender that lawyer would have been contacted prior to any effort to interview Cain.

the officers and voluntarily waived his right to have an attorney present. Therefore, the Government contends that under *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the statements made after the Initial Appearance would be admissible.[5]

A. Defendant Cain's Sixth Amendment Right to Counsel

A defendant's Sixth Amendment right to counsel attaches as police activity transitions from investigating a Defendant to prosecuting him. *United States v. D'Anjou*, 16 F.3d 604, 608 (4th Cir. 1994). As soon as the judicial proceedings are initiated, the Defendant has a Sixth Amendment right to counsel. *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The underlying purpose of this is to "assure that the criminal defendant is not forced to face 'the prosecutorial forces of organized society' alone." *D'Anjou*, 16 F.3d at 608 (quoting *Moran v. Burbine*, 475 U.S. 412, 428 (1986)). This does not mean that the Sixth Amendment right to counsel attaches simply at the time of arrest. *United States v. Gouveia*, 467 U.S. 180, 190 (1984). Rather, a defendant's Sixth Amendment right to counsel attaches only once adversary judicial criminal proceedings have commenced against him. *Brewer*, 430 U.S. at 398; *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). It can attach as early as the first formal charging proceeding. *Moran*, 475 U.S. at 428. This can be "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S. at 692. Once the right to counsel has attached, a

[5]In *Edwards*, the request for counsel was made during custodial interrogation. 451 U.S. at 482. Accordingly, the Court based its decision on the Fifth Amendment protection against compelled self-incrimination. In the case at bar, the Defendant requested counsel during a judicial proceeding, therefore asserting his Sixth Amendment right to counsel. Under *Michigan v. Jackson*, 475 U.S. 625, 632 (1986), the Sixth Amendment right to counsel "requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation." Therefore, while this Court analyzes this case under the Sixth Amendment, any protections that would be afforded to Cain under his Fifth Amendment right to counsel would also be afforded to him under his Sixth Amendment right to counsel.

defendant can invoke the right to counsel by taking any action that "can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil*, 501 U.S. at 178.

In this case, Defendant Cain appeared before a Magistrate Judge of this Court for his Initial Appearance the day following his arrest. This would signal the transition from the investigation of Cain to the prosecution of Cain and would constitute a judicial proceeding. Therefore, Cain's Sixth Amendment right to counsel attached. Furthermore, Cain completed a financial affidavit during the Initial Appearance requesting that Magistrate Judge Bredar appoint counsel to represent him. This is a clear "expression of a desire for the assistance of an attorney." *Id.* Therefore, this Court finds, as the Government concedes, that Cain's Sixth Amendment right to counsel attached at his Initial Appearance prior to his speaking with the law enforcement agents on November 30, 2006.

B. The Initiation of Lenny Lyle Cain's Statements

Under *Massiah v. United States*, 377 U.S. 201, 206 (1964), once a defendant's right to counsel attaches, statements that are deliberately elicited from the defendant by federal agents in the absence of the defendant's counsel are not admissible. Under *Edwards*, 451 U.S. at 484-85, "an accused. . .having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." The Court subsequently extended this reasoning to Sixth Amendment cases and created an even stricter rule in *Michigan v. Jackson*, 475 U.S. 625 (1986). There, the Court held that if the police initiate interrogation after a defendant's assertion of his Sixth Amendment right to counsel at an arraignment, "*any waiver* of the defendant's right to counsel for that police-initiated interrogation is invalid." *Jackson*, 475 U.S. at 636 (emphasis added). *See also Murphy v.*

Holland, 845 F.2d 83, 85 (4th Cir. 1988). The Court created a binding presumption, in effect displacing the case-by-case analysis set out in *Edwards* for determining whether a waiver has, in fact, occurred. *Wilson v. Murray*, 806 F.2d 1232, 1237 (4th Cir. 1986).

Once the right to counsel has attached and been asserted, the Government must honor it. *Moulton*, 474 U.S. at 170. The Sixth Amendment right to counsel guarantees the defendant the right to rely on counsel as a "medium" between him and the state. *United States v. Kennedy*, 372 F.3d 686, 700 (4th Cir. 2004) (citing *Moulton*, 474 U.S. at 176). This imposes "an affirmative obligation [on the Government] to respect and preserve the accused's choice to seek this assistance" and "not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171. This obligation must be kept in mind when determining whether the police elicited statements from the defendant or whether the defendant voluntarily waived his right to counsel. *Brewer*, 430 U.S. at 404.

This Court acknowledges that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Michigan v. Harvey*, 494 U.S. 344, 352 (1991). In fact, the Fourth Circuit has ruled a defendant's statement to law enforcement agents admissible at trial, when the defendant requested to speak with the agents, thereby waiving his Sixth Amendment right to counsel. *United States v. Cummings*, 937 F.2d 941, 946-47 (4th Cir. 1991). However, *Cummings* involved a statement to federal authorities prior to the federal indictment being issued. *Id.* at 946. The defendant had not appeared before a United States Magistrate Judge on federal charges. This Court holds that upon the request for court-appointed counsel by Defendant Cain, any subsequent interview without seeking the presence of that counsel is violative of his Sixth Amendment rights. However, alternatively, this Court holds that such an

interview is violative of this Court's implementation of its Criminal Justice Act Plan as set forth in Appendix 2 of the Local Rules of this Court.

C. The Criminal Justice Act Plan of this Court

Pursuant to the Criminal Justice Act of 1964, as codified at 18 U.S.C. § 3006A and herein referenced as "the CJA," this Court adopted a CJA Plan which was approved by the Judicial Council of the United States Court of Appeals for the Fourth Circuit.[6] The stated objectives of this plan are to implement the CJA and to attain the ideal of equality before the law for all criminally accused persons. The CJA specifically provides that each U.S. District Court shall place in operation a CJA Plan. 18 U.S.C. § 3006A(a). The act further provides that a "person for whom counsel is appointed shall be represented at every stage of the proceeding *from his Initial Appearance* before the United States magistrate judge..." § 3006(A)(c) (emphasis added). Furthermore, the CJA Plan of this Court provides that CJA counsel "shall be provided to eligible persons as soon as feasible...or (5) when a judge otherwise considers appointment of counsel appropriate under the CJA..." Section IVB.

At his appearance before Magistrate Judge Bredar on November 29, 2006, Defendant Cain requested CJA counsel be appointed for him. Judge Bredar began the process of that appointment. The interview of Cain after this request and after the Court began implementation of the appointment process is violative of this Court's CJA Plan. It is undisputed that if Cain had been assigned an Assistant Federal Public Defender, counsel for the Government would have telephoned the Office of the Federal Public Defender with respect to the conduct of the interview. The rights of criminal defendants under this Court's CJA Plan cannot vary depending upon whether they are assigned an Assistant Public Defender or a lawyer from the CJA Panel.

[6]The CJA Plan is attached to this Memorandum Opinion as "Attachment A."

In the implementation of this Court's CJA Plan, CJA Panel Attorneys are provided as soon "as feasible." This necessarily requires recognition by Government counsel that the effective and fair implementation of the CJA Plan of this Court necessitates the same recognition of court-appointed counsel, whether from the Office of the Federal Public Defender or from the CJA Panel. Accordingly, apart from this Court's constitutional analysis under *Edwards v. Arizona*, 451 U.S. 477 (1981), the interview of Defendant Cain violates the procedures of this Court with respect to court-appointed counsel and the implementation of the CJA Plan of this Court. Accordingly, any interview of Defendant Cain after his appearance in front of Magistrate Judge Bredar shall be suppressed.

Conclusion

For the reasons stated above, Defendant's Motion to Suppress Statements, Admissions and Confessions is GRANTED in part and DENIED in part. Specifically, it is denied with respect to any statements made prior to his Initial Appearance before Magistrate Judge Bredar and granted with respect to any statements made after said appearance. A separate Order follows.

Dated: June 12, 2007

/s/
Richard D. Bennett
United States District Judge